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NO. 84-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RED STAR MARINE SERVICES, INC.,
Petitioner,

vs.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Respondent.

SUPPLEMENTAL BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 22.6

JAMES M. KENNY
Attorney for Petitioner
80 Pine Street
New York, New York 10005
(212) 422-0222

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Red Star Marine Services, Inc. calls the attention of the Court to a new case which further demonstrates the conflict of the decision below with the decisions of other Courts of Appeal on the issue of the jurisdiction of the Occupational Health and Safety Administration (OSHA) to regulate the workplaces of seamen.

The Ninth Circuit on September 11, 1984, in *Kopczynski* v. *The Jacqueline** (not yet reported), refused to extend

* The vessel Jacqueline, United States Coast Guard documentation number 519060, is 42 gross tons and is an uninspected vessel. The vessel's homeport is Los Angeles, California. (To confirm that the vessel is uninspected, call Coast Guard documentation section Los Angeles—213-590-2392.)

OSHA jurisdiction to regulate the working conditions of seamen. The Court of Appeals in *Kopczynski*, an action for seaman's personal injuries, brought under the *Jones Act* 46 U.S.C. 688, upheld the District Court's refusal to charge the jury that an OSHA regulation governing the use of gangways or ladders on vessels was a standard of care applicable to seamen. The Ninth Circuit interpreted Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §653(b)(1) and relied upon the fact that "The Coast Guard is the primary federal agency which exercises authority over the working conditions of seamen" to exclude OSHA from regulating the workplace of seamen aboard vessels. The Ninth Circuit decision cited as authority for its ruling, *Donovan* v. *Texaco,* 720 F.2d 825 (5th Cir. 1983); *Clary* v. *Ocean Drilling and Exploration Co.,* 609 F.2d 1120 (5th Cir. 1980) and *Taylor* v. *Moore-McCormack Lines, Inc.,* 421 F.2d 88 (4th Cir. 1980).

The decision below will expose vessel operators in the Second Circuit to *Jones Act* claims by seamen on uninspected vessels based upon violation of OSHA regulations with the concomitant strict liability implications of the doctrine of negligence *per se* while similar vessel operators in the Fourth, Fifth and Ninth Circuits have no such exposure. Certainly, Second Circuit vessel operators will be at a financial disadvantage as a result of increased insurance costs arising out of that fertile field for maritime personel injury litigation, the *Jones Act.*

There is no doubt that the Fourth Circuit, pursuant to the decision in *Barger* v. *Mayor & City Council of Baltimore,* 616 F.2d 730 (4th Cir. 1980), has held the subject OSHA noise regulations inapplicable to seamen. In *Barger,* city firemen of Baltimore, who are seamen, sued for hearing loss as a result of exposure to noise on city fireboats. Baltimore has four fireboats: 1) P.W. WILKINSON, 93 gross

tons; 2) AUGUST EMRICH, 93 gross tons; 3) MAYOR J. HAROLD GRADY, 93 gross tons; and 4) MAYOR THOMAS DALESSANDRO, JR., 149 gross tons. See *Merchant Vessels of the United States*, 1980 (United States Department of Transportation, United States Gov't Printing Office), Vols. I & II, 2305, 140, 1005, and 1220. All of these boats are less than 300 gross tons and are uninspected vessels like the subject vessel, the STAMFORD. The ruling of the Fourth Circuit in *Barger*, therefore, could not be in more direct conflict with the decision below of the Second Circuit.

CONCLUSION

For these reasons and the reasons stated in the Petition, a writ of certiorari should issue to review the opinion of the Second Circuit.

Respectfully submitted,

JAMES M. KENNY
Attorney for Petitioner
80 Pine Street
New York, New York 10005
(212) 422-0222

October 22, 1984